UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NO.05-11738-EFH

Brendan M. McGUINNESS,
Plaintiff,

vs.

James R. BENDER, et al.,
Defendants.

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.

Plaintiff brings the following reply as an opposition to the defendants' motion for summary judgment in part, and also as a rebuttal to some things argued by the defense.

1.) As addressed in the attached Motion to Strike, the defendants are relying mainly on hear-say and unproven allegations of bad conduct in their Memorandum of Law filed in support of their motion. Almost everything pointed to as a fact by the defendants (certainly any reference to any incident in the the county jails) is hotly disputed by plaintiff. Not one of those reports was adjudicated on its merits. It has no place at this stage of litigation.

2.) The defendants have argued that plaintiff has failed in some way to exhaust available administrative remedies as required by law prior to bringing suit in this Court. This claim is without merit. In fact, plaintiff has addressed his concerns to the highest administrative authorities ad nauseum. Please see Exhibit A, pp. 13-18 of Plaintiff's Motion for Partial Summary Judgment. Compare p. 23, id. ("After internal review your appeal is denied")(signed by defendant Bender). Moreover,

the grievance procedures specifically exempt disciplinary matters from consideration; the disciplinary appeal process is the equivalent of a formal grievance. All of the things plaintiff complains of flowed from a disciplinary decision which was upheld on appeal by defendant Bender.

3.) Plaintiff now sees that his claim that the nature of his pretrial confinement at Souza-Baranowski's SMU (i.e. Special Management Unit) constituted punishment cannot be decided at this stage of the litigation. The parties clearly do not agree on the way such confinement can be properly characterized. While the parties are in agreement as to the proper legal standard to be applied (both parties citing Bell v. Wolfish, 441 U.S. 535 [197?] and Collazo-Leon v. Bureau of Prisons, 51 F.3d 315 [1st Cir. 1995]), it is the specific conditions of confinement upon which the Court will have to base its decision. Such facts are neither agreed upon nor even in the record at this time. Judgment on this issue is inappropriate at present.

Exhibit 6 to the Plaintiff's Affidavit

4.) The letter which the defense submits as proof that they had the DA's permission to transfer plaintiff as G.L. c. 276, section 52A demands is signed not by the DA, but by one of his assistants. 52A mentions nothing about assistants. The law was not complied with and the transfer was illegal.

5.) Plaintiff hereby drops his double jeopardy claim. It has come to his attention that the second instance of jeopardy is the one which must be attacked.

6.) Plaintiff pled guilty to the offenses charged in the two disciplinary reports for which he was committed to the DDU for five (5) years; the defense makes much of this, using the plea to negate any claim that the process was not legally sound. This is a specious argument. Plaintiff objected in all ways available to him to the process itself; once the motion to dismiss the reports (and the hearing itself) was

denied by the hearing officer, plaintiff's only chance for redress was the disciplinary appeal. The conduct of the hearing is irrelevant to a claim that the hearing itself should not have occurred based on time considerations and plaintiff's having left custody, etc. Innocence or guilt has no bearing on whether due process considerations barred the hearing itself.

7.) The defendants' reference to Commonwealth v. Forte, 423 Mass. 672 (1996) on pp. 19 and 20 of their Memorandum is inaposite. Whereas Forte dealt with "wrongdoers" and the DOC's prerogative in making changes in their terms of confinement, plaintiff was a pretrial detainee at the time in question. The question of whether he was in fact a "wrongdoer" was an open one.

8.) 103 CMR 420.00 et seq. clearly states that sentenced inmates are to be sent to a certain prison and allowed to undergo a process of classification. The defendants have not classified plaintiff because they say "oh, we already knew what to do with him." They flaunt the regulations at whim; plaintiff, as a result, was placed in solitary confinement immediately upon sentencing. For the reasons outlined in his Motion for Partial Summary Judgment, plaintiff reiterates that his rights were violated; the result was atypical and significant hardship.

See attached letter to DOC Commissioner Exhibit 1

9.) In further support of his argument relative to Article XII of the Massachusetts Declaration of Rights, plaintiff submits the attached amici brief of CPCS and the ACLU in MacDougall v. Commonwealth, SJC-09509. The defendants mentioned this matter in their memorandum. (Addendum One.)

RESPECTFULLY SUBMITTED,

Brendan McGuinness

Brendan M. McGuinness
S.B.C.C.
P.O. BOX 8000
SHIRLEY, MA 01464

Dated: 4/24/06

cc. William Saltzman, Esq.
file.

TO: KATHLEEN M. DENNEHY, DOC COMMISSIONER
FROM: BRENDAN M. McGUINNESS W86294
RE: 103 CMR 420.00 et seq. (Classification)
DATE: February 17th, 2006.

Dear Mrs. Dennehy:

Hi. I'm writing to you yet again to complain of yet another violation of my rights while in the custody of the Department of Correction. Since you are the commissioner of correction, I would truly appreciate it if you would see fit to reply to my complaint personally. In the recent past, I have been ignored by your deputy, James Bender. On other occasions when either I or my family have written to you, the responses we've met with by your staff here at the prison level have been completely inadequate.

Mrs. Dennehy, on September 28, 2005, I was sentenced to serve 3½ years to 3½ years-and-one-day in prison by the superior court for Norfolk County. 103 CMR 420.08 demands that:

> "Upon commitment to the (DOC), each inmate shall be admitted to a Reception Center where he or she will undergo an initial classification process."

I was never admitted to a Reception Center upon sentencing; I was never put through the classification process outlined in the above regulation. As you are well aware, these regulations have the force of law and are binding upon the agency which promulgated them---i.e. the DOC. "The process will provide an opportunity for the Reception Center staff members to become acquainted with each inmate through individual assessment, testing, and structured interviews. As part of the process, each inmate should receive an oral and written orientation to the policies and program opportunities of the Department."

The "Initial Classification Process" outlined in section 420.08 provides a very clear set of strictures for assessing how to deal with new commitments to the DOC. I was denied all of the protections of your laws. When I wassent to prison on 9/28/05, your Department simply by-passed the law and placed me directly into a maximum-security prison; I was then placed directly into the Department Disciplinary Unit ("DDU") to serve a sanction which the DOC had imposed upon me while I was a pretrial detainee. This is all illegal for the myriad reasons (all of which you will find I have outlined in correspondence to your designees and subordinates if you'll peruse my file) I've submitted to

Deputy Bender, but it is just as clear from looking at the relevant state law regulations governing the classification of inmates upon sentencing that the manner in which I have been summarily designated "DDU status" represents a clear and blatant violation of my substantive due process rights as a newly committed prisoner.

For five (5) months now I have been in your custody as a sentenced inmate and I have not received any of the process outlined in 103 CMR 420.08; I have not been assessed to determine what (if any) specific needs I may have and how best to deal with them. In short, without classifying me, how can anyone make a determination as to how best to deal with me, where I should be housed, etc. Your staff have consigned me to punitive segregation for the duration of my entire sentence based upon events from the pretrial period.

Section 420.10 provides a seldom-used but viable option for classifying and placing inmates who, inter alia, "present difficult placement issues." I take it from the very existence of a "Department Review Board" that placement of inmates is a decision which merits the attention of an entire board of competent personnel. So how is it that I have been allowed to enter the DOC and disappear to solitary confinement without so much as an initial classification? There is an actual regulation requiring such initial classification; and subsequent classification (see 103 CMR 420.09).

I will also send a copy of this letter to Anthony Mendonsa, the Deputy of Classification here at Souza-Baranowski Correctional Center. You are holding me as a DDU prisoner for something that happened before I was ever even in DOC custody as a sentenced prisoner.

Please address the complete absence of any classification process as the law (103 CMR 420.00 et seq.) mandates. Thank you for your time and attention to this matter.

RESPECTFULLY SUBMITTED,

Brendan M. McGuinness W86294
S.B.C.C.
P.O. BOX 8000
SHIRLEY, MA 01464-8000

cc. Anthony Mendonsa, SBCC
file.

Security Levels

Level Six | Level Five | Level Four | Level Three | Level Two | Level One
Definition: Design Capacity, Facility Count

Level Six. A custody level in which both design/construction as well as inmate classification reflect the need to provide maximum external and internal control and supervision of inmates primarily through the use of high security parameters and extensive use of internal physical barriers and check points. Inmates accorded this status present serious escape risks or pose serious threats to themselves, to other inmates, to staff, or the orderly running of the institution. Supervision of inmates is direct and constant.
Level Six Facilities: MCI-Cedar Junction, Souza-Baranowski Correctional Center.

Level Five. A custody level in which design/construction as well as inmate classification reflect the need to provide maximum external and internal control and supervision of inmates. Inmates accorded to this status may present an escape risk or pose a threat to other inmates, staff, or the orderly running of the institution, however, at a lesser degree than those at level 6. Supervision remains constant and direct. Through an inmates willingness to comply with institutional rules and regulations, increased job and program opportunities exist.
Level Five Facility: Old Colony Correctional Center.

Level Four. A custody level in which both the design/construction as well as inmate classification reflect the goal of restoring to the inmate some degree of responsibility and control of their own behavior and actions, while still insuring the safety of staff and inmates. Design/construction is generally characterized by high security parameters and limited use of internal physical barriers. Inmates at this level have demonstrated the ability to abide by rules and regulations and require intermittent supervision. However, behavior in the community, i.e., criminal sentence and/or the presence of serious outstanding legal matters indicate the need for some control and for segregation from the community. Job and program opportunities exist for all inmates within the perimeter of the facility.
Level Four Facilities: Bay State Correctional Center, Bridgewater State Hospital, MCI-Concord, Massachusetts Treatment Center, MCI-Norfolk, North Central Correctional Institution, Shattuck Hosp. Correctional Unit.
Level Four/Three: MCI-Shirley Complex, Massachusetts Alcohol and Substance Abuse Center.

Level Three. A custody level in which both the design/construction as well as inmate classification reflect the goal of returning to the inmate a greater

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NORFOLK COUNTY NO. 09509

MARK MACDOUGALL

V.

COMMONWEALTH

ON APPEAL FROM A JUDGMENT OF THE
SINGLE JUSTICE OF THE SUPREME JUDICIAL COURT

BRIEF AND RECORD APPENDIX OF THE COMMITTEE FOR PUBLIC COUNSEL SERVICES AND THE AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS AS AMICI CURIAE IN SUPPORT OF THE PETITIONER

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December, 2005.

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ISSUES PRESENTED

1. Whether the single justice erred when he denied the petition of appellant MacDougall, a pretrial detainee, claiming that his right to due process was violated when he was transferred from a county jail to a maximum-security state prison without an evidentiary hearing and findings of fact by a judge.

2. Whether the single justice erred when he denied MacDougall's petition claiming that his transfer from a county jail to a maximum-security state prison, while he was still a pretrial detainee, was a violation of his right to due process because it subjected him to "infamous punishment" even though he had not been convicted of any crime.

3. Whether, aside from an order by this Court that MacDougall be returned forthwith to the Norfolk County jail, there exists any adequate alternative remedy for the deprivation of due process that MacDougall has endured.

STATEMENT OF THE INTEREST OF AMICI CURIAE

Committee for Public Counsel Services

The Committee for Public Counsel Services (CPCS), the Massachusetts public defender agency, represents

indigent defendants in criminal trials. CPCS submits this brief in support of the contentions of petitioner Mark MacDougall (1) that his right to due process was violated when he was transferred from a county jail to a maximum-security state prison without an evidentiary hearing and findings of fact by a judge; and (2) that his transfer also violated his right to due process by subjecting him to "infamous punishment," even though he had not been convicted of any crime.

These issues are of great importance to CPCS, because many of its clients, by virtue of their indigency, are unable to post bail while awaiting trial and, therefore, experience protracted pretrial detention, during which they are subject to transfer from institution to institution. Such multiple transfers can cause serious harm to the liberty interests of CPCS's clients in a number of respects, including (1) disruption of communication between clients and their attorneys at critical junctures (e.g., during discovery, pretrial motion filing, and trial preparation); and (2) exposure of clients to serious physical harm as a result of their being intermingled with convicted felons, including those who have been found guilty of the most serious crimes of violence.

American Civil Liberties Union of Massachusetts

The American Civil Liberties Union of Massachusetts (ACLUM), an affiliate of the American Civil Liberties Union, is a statewide, nonprofit organization with a membership of over 20,000, which is dedicated to the preservation and protection of the rights and liberties protected by the United States Constitution and the Constitution of the Commonwealth. The ACLU has a long history of concern for the right to counsel and for the rights of prisoners, and has participated in a number of cases in this Court, both through direct representation and as amicus curiae. Through its representation of county jail prisoners over the course of the past thirty years, the ACLU is familiar with the practice of transferring pretrial detainees and sentenced prisoners and has received reports of numerous instances of the arbitrary use of this practice for punitive purposes.

Amici urge this Court to rule (1) that a pretrial detainee may not be transferred from a jail to any other correctional institution except by court order following formal proceedings that comport with due process, including an evidentiary hearing and factual findings by a judge; and (2) that, in any event, a

pretrial detainee may not be transferred from a jail to a maximum-security state prison, because such transfer subjects the detainee to "infamous punishment" even though he has not been convicted of any crime.

STATEMENT OF THE CASE

Amici hereby augment the statement of the case set forth in MacDougall's appellate brief with the following information.

This case involves an appeal from the denial by the single justice of MacDougall's petition, pursuant to G.L. c.211, §3, challenging the constitutionality of G.L. c.276, §52A. Pursuant to that statute, the Commonwealth is holding MacDougall in a maximum-security state prison, even though he is still a pretrial detainee. This Court's order pursuant to Rule 2:21, permitting MacDougall to appeal the single justice's denial, was issued on July 29, 2005 (R.A. 57-58).[1/] MacDougall filed his appellate brief in this Court on October 17, 2005 (A.A. 3). The Commonwealth's brief in response to MacDougall's is due on February 17, 2006 (id.).

[1/]The Record Appendix to MacDougall's appellate brief will be cited herein as "(R.A.)" and the text of the brief as "(M.Br. __)." The appendix to the present brief will be cited as "(A.A. __)."

Except at the time of filing of his original Superior Court motion challenging his transfer to state prison, MacDougall has acted pro se throughout this matter.

STATEMENT OF FACTS

Amici hereby augment the statement of facts set forth in MacDougall's appellate brief with the following excerpt from this Court's order of July 29, 2005, permitting MacDougall to appeal from the single justice's denial of his petition.

> In 2002, [MacDougall] was indicted for certain felonies and held in the Norfolk County correctional facility in lieu of bail. While he was there, he allegedly assaulted a correctional officer. He was indicted for that offense and related offenses and ordered held without bail. He was subsequently transferred to the Plymouth County correctional facility and ultimately to the State prison at Cedar Junction, all while the various charges against him were pending. A Superior Court judge denied his motion to transfer him to a jail or correctional institution while awaiting trial. This petition and appeal followed.

(R.A. 59)

ARGUMENT

I.

THE SINGLE JUSTICE ERRED WHEN HE DENIED THE PETITION OF APPELLANT MACDOUGALL, A PRETRIAL DETAINEE, CLAIMING THAT HIS RIGHT TO DUE PROCESS WAS VIOLATED WHEN HE WAS TRANSFERRED FROM A COUNTY JAIL TO A MAXIMUM-SECURITY STATE PRISON WITHOUT AN EVIDENTIARY HEARING AND FINDINGS OF FACT BY A JUDGE.

A. Introduction.

In this matter, one of first impression, Amici strongly support MacDougall's contention that he should not have been transferred from a county jail to a maximum-security state prison without a court order following an evidentiary hearing and findings of fact by a judge (M.Br. 2-5). In rejecting MacDougall's petition regarding this matter, pursuant to G.L. c.211, §3, the single justice implicitly endorsed the Superior Court judge's ruling on MacDougall's motion for relief,[2/] which is set forth in its entirety below.

> G.L. c.276[,] §52A[,] does not require an order of this court to transfer a pre-trial detainee from a jail to a correctional facility, if the detainee is otherwise eligible for transfer to a prison. The statute merely sets forth an alternative means by which a detainee may be transferred, i.e., by order of the court. It does not imply that a court order is the only way such

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[2/]The single justice's terse rejection of petitioner's petition did not include any explanation for that ruling (R.A. 48).

a transfer may be lawfully accomplished. (R.A. 24). As this ruling was deeply flawed, the single justice erred in finding it unobjectionable.

In the following sections, Amici discuss several aspects of this matter that they wish to call to this Court's attention.

B. The transfer of a pretrial detainee from a county jail to a maximum-security state prison jeopardizes important constitutional rights.

Several critical constitutional rights of a pretrial detainee are threatened by the transfer of the detainee from a county jail to a maximum-security state prison. Such a transfer can significantly disrupt communication between the detainee and his attorney during the period when critical decisions must be made regarding discovery, the locating and interviewing of witnesses, the filing of motions to suppress or to dismiss, potential plea negotiations, and the development of a strategy for the defense at trial. The detainee can ill afford to be shuttled back and forth among institutions during this period, such that correspondence from attorney to client may go unforwarded and important documents in the detainee's possession may be lost. These circumstances seriously impinge

upon a detainee's liberty interests, specifically, his constitutional rights to have the effective assistance of counsel, to present a defense, and to have a speedy trial.

In Cobb v. Aytch, 643 F.2d 946, 957-960 (3d Cir. 1981), the transfer of pretrial detainees to other, distant facilities was deemed to have interfered with their access to counsel, thereby violating their federal constitutional rights to the effective assistance of counsel and to a speedy trial.[3/] The Court in Cobb forcefully described the detainees' deprivation thus:

> [The transfers] seriously impinged upon their personal liberty as protected by the speedy trial clause not only by prolongation of detention, but also by removing defendants from proximity to potential witnesses. The drastic reduction in visits by family and friends which the trial court found to be the result of the transfers obviously curtailed the ability of the defendants to communicate with potential witnesses through those most likely to be willing to assist. And, while the transfers interfered with what the prisoners could do to help themselves, they interfered even more drastically with what counsel might have been able to do for them.... Most [detainees] ... represented by the [public defender's office] were deprived

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[3/]See Covino v. Vermont Department of Correction, 933 F.2d 128, 130 (2nd Cir. 1991) (remanding for determination whether transfer of pretrial detainee to different institution "unconstitutionally impaired [his] sixth amendment right of access to his trial counsel").

> of pretrial interviews. The trial court concluded "that in most instances a transfer would violate the pretrial detainee's due process rights and subject him or her to serious harm such as not being able to prepare a criminal defense"....

Cobb, 643 F.2d at 960.

In the case at bar, MacDougall's trial preparation has been punctuated by a dizzying itinerary through the correctional system. Since his initial detention on his underlying charges in the Norfolk County jail, he has been transferred on three different occasions to the Plymouth County Correctional Facility and once to the Bristol County Correctional Facility (R.A. 20 n.4), thence to the state prison in Walpole (Cedar Junction), thence to M.C.I.-Norfolk, and finally to his present location, the Souza-Baranowski Correctional Center in Shirley (A.A. 1).

In addition to the detriment to MacDougall's trial preparation, his transfer to a maximum-security state prison has affected his most precious constitutional right, his right to physical safety. MacDougall's detention at Souza-Baranowski exposes him to physical harm at the hands of some of the most violent convicts in the correctional system. According to the Department of Correction's scale for rating the security levels of its institutions, Souza-Baranowski

is a "Level 6" institution. Level 6 is the highest security category; only two institutions occupy that level, Souza-Baranowski and "the state prison" at Walpole (Cedar Junction). See the Department's policy statement, 103 DOC 101 (entitled "Correctional Institution/Security Levels"), set forth in the Addendum, below, at pages 30-35. That document's summary of the system's six security levels includes (at page 34) the following description of Level 6, which gives a flavor of the harsh reality facing inmates who find themselves incarcerated at this level.

> A security level in which both design/ construction as well as inmate classification, reflect the need to provide maximum external and internal control and supervision of inmates primarily through the use of high security perimeters and extensive use of internal physical barriers and check points. Inmates within this security level present serious escape risks or pose serious threats to themselves, to other inmates, to staff, or the orderly running of the institution. Supervision of inmates is direct and constant.

Supplementing this document's abstract language regarding physical danger is the handwritten letter that MacDougall sent to Chief Justice Marshall from the state prison at Cedar Junction on May 16, 2005, requesting that this Court allow him to proceed with his appeal under Rule 2:21. In the letter, MacDougall states,

"Not only are my substantive rights being violated, but just being in Walpole puts my life in jeopardy simply by the class of convicts held in this institution" (A.A. 6). Those words could just as well have been written from MacDougall's cell at Souza-Baranowski, the institution where former priest John J. Geoghan met his untimely, violent end. See Boston Globe, Aug. 24, 2003, at A1 ("Ex-Priest Geoghan Attacked, Dies").

C. In light of the constitutional rights at stake, G.L. c.276, §52A, should be read as precluding the transfer of a pretrial detainee to state prison without an evidentiary hearing and findings of fact by a judge.

It is inferable that the Legislature, in enacting the second sentence of G.L. c.276, §52A, authorizing the transfer of a pretrial detainee from a county jail to a maximum-security state prison, would have been aware that such a transfer raises serious constitutional concerns. That is because, at the time of that enactment,[4/] there already existed another statute, G.L. c.127, §22, directing that, in a county jail, "[p]ersons committed on charge of crime shall not be

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[4/]The second sentence of G.L. c.276, §52A, authorizing the transfer of a pretrial detainee from a county jail to a state correctional institution, was inserted in 1971.

confined with convicts...." (emphasis added).[5/] The imperative language ("shall not") of G.L. c.127, §22, see Commonwealth v. Kennedy, 435 Mass. 527, 530 (2001) ("[t]he word 'shall' ... indicates that the action is mandatory"), strongly suggests that the Legislature viewed the mingling of pretrial detainees with convicted inmates as fundamentally unacceptable. Under well-established rules of statutory construction, it must be assumed (1) that the Legislature was cognizant of the substance of G.L. c.127, §22, when, in 1971, the second sentence of G.L. c.276, §52A, was inserted (see Commonwealth v. McLeod, 437 Mass. 286, 290 [2002]) ["Courts presume that the Legislature is aware of existing statutes when it amends a statute or enacts a new one"]); and (2) that the Legislature understood that the two statutes would have to be harmonized to produce a coherent statutory scheme. See Commonwealth v. Smith, 431 Mass. 417, 424 (2000), quoting from Board of Educ. v. Assessor of Worcester, 368 Mass. 511, 513-514 (1975) ("statutes which relate to a common subject matter 'should be construed together so as to

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[5/]The office of legal counsel to the Norfolk County Sheriff has informed Amici that, based on the authority of G.L. c.127, §22, it is the official policy of the Sheriff to isolate pretrial detainees from convicted inmates at the House of Correction complex in Dedham.

constitute an harmonious whole'").

In light of the Legislature's solicitude towards pretrial detainees in the jail context (G.L. c.127, §22), it is difficult to discern how that statute can be harmonized with G.L. c.276, §52A, which authorizes the transfer of pretrial detainees into the midst of a maximum-security state prison population of convicted felons. If such harmonization is possible at all, it must be on the basis that transfers to state prison should not occur unless preceded by a judicial hearing, including the presentation of evidence, a strong showing of necessity by the Commonwealth, and factual findings by the judge sufficient to justify a transfer order.

The Superior Court judge in this case violated MacDougall's right to due process when she denied his motion to be returned to the Norfolk County jail on the ground that "[t]he statute [G.L. c.276, §52A] merely sets forth an alternative means by which a detainee may be transferred...." (R.A. 24). Neither the judge nor the language of §52A suggests what a proper alternative to a court order might be. The judge's flawed interpretation of the statute is an open invitation to arbitrary transfers based on the caprice of a pretrial detainee's jailers or the employees of the district attorney's office.

D. The facial language of the statute supports MacDougall's position.

The facial language G.L. c.276, §52A, contains two specific indications that the Legislature intended that the transfer of a pretrial detainee to state prison be preceded by a judicial hearing comporting with basic principles of due process. First, the statute states that "[t]he proceedings for such removals [from jail to state correctional institution] shall be the same as for the removal of prisoners from one jail or house of correction to another" (emphasis added). The explicit reference to "proceedings" surely refers to formal, orderly procedures of some sort. See Black's Law Dictionary (5th ed. 1979) (defining "proceeding" thus: "[T]he form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before agencies, tribunals, bureaus, or the like"). Moreover, the imperative statutory language ("shall be the same") expressly directs that such transfer procedures be uniform across the correctional system (i.e., in both jail-to-jail transfers and jail-to-state institution transfers).

The second aspect of the facial language of G.L. c.276, §52A, that supports MacDougall's position is the statement that pretrial detainees are subject to transfer to state prison "if they have been previously incarcerated in a correctional institution of the commonwealth under sentence for a felony...." Whether or not a pretrial detainee satisfies this condition for transfer is a question of fact, as to which there may be some dispute. Such a dispute may involve complexities that can only be definitively resolved by a judge, an impartial "referee" of factual disagreements between parties to litigation. See Commonwealth v. Koney, 421 Mass. 295, 301 (1995) (at trial on subsequent offense portion of indictment, evidence insufficient to identify defendant as perpetrator of prior offense, despite Commonwealth's introduction of documents purportly showing prior conviction of person bearing defendant's precise name). It would be unseemly (indeed, unconstitutional) for such a question to be resolved unilaterally by the pretrial detainee's jailer or an employee of the district attorney's office, either of whom might have questionable motives for wanting to remove the detainee to a distant place of detention.[6/]

[6/]Precisely because of the "local" character of county

(FOOTNOTE CONTINUED ON NEXT PAGE)

The need for resolution of factual disputes by a judge is borne out by this Court's own language summarizing the factual background of this case in the order permitting MacDougall's appeal to proceed. There the Court properly acknowledged the uncertainty as to what actually happened: "While [MacDougall] was [in the Norfolk County jail], he allegedly assaulted a correctional officer" (R.A. 59) (emphasis added).

E. Discussion of the relationship to this case of the jurisprudence regarding change of venue of criminal trials.

The principles governing change of venue of criminal trials shed useful light on the present issue, which involves, in essence, the repeated change of venue of MacDougall's detention prior to his trial. One of the basic principles of our legal system is that criminal trials generally occur in the venue where the alleged offense occurred. In a venerable line of cases, this Court has repeatedly opined that "[t]he power of the court to allow a change as to the place of

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[6/] (FOOTNOTE CONTINUED FROM PREVIOUS PAGE) jails, sheriffs' departments, and district attorneys' offices, it is not inconceivable that a jailer or prosecutor will have had personal dealings with a detainee or his family. In such circumstances, subjective biases could impinge on decision-making regarding management of the jail population.

a trial by jury 'should be exercised with great caution and only after a solid foundation of fact has been first established.'" Commonwealth v. Smith, 357 Mass. 168, 173 (1970), quoting from Crocker v. Superior Court, 208 Mass. 162, 180 (1911). See Commonwealth v. Morales, 440 Mass. 536, 542 (2003). This principle has roots in art. 13 of the Massachusetts Declaration of Rights, which states, "In criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen." See Commonwealth v. Brogan, 415 Mass. 169, 174 (1993) ("[o]ne concept underlying art. 13 is that fairness to a defendant normally requires that the defendant not be transported far away for trial but rather be tried where there is access to witnesses and evidence for the defense").

The gist of the jurisprudence of change of venue of criminal trials is that such change should be difficult to procure. Therefore, Amici contend, the venue of the pretrial detainee's detention -- which is so critical to his preparation for his trial -- should also be difficult to change. At the very least, the place of detention should not be changeable at the mere

whim of the jailer or the district attorney. Rather, any such change should be authorized "with great caution and only after a solid foundation of fact has been first established," Crocker v. Superior Court, supra, 208 Mass. at 180, i.e., after an evidentiary hearing and findings of fact by a judge.

F. Conclusion.

In sum, Amici contend that the single justice erred in finding unobjectionable the Superior Court judge's denial of MacDougall's motion to be transferred back to the Norfolk County jail. Therefore, the single justice's ruling should be reversed.

II.

THE SINGLE JUSTICE ERRED WHEN HE DENIED MACDOUGALL'S PETITION CLAIMING THAT HIS TRANSFER FROM A COUNTY JAIL TO A MAXIMUM-SECURITY STATE PRISON, WHILE HE WAS STILL A PRETRIAL DETAINEE, WAS A VIOLATION OF HIS RIGHT TO DUE PROCESS BECAUSE IT SUBJECTED HIM TO "INFAMOUS PUNISHMENT" EVEN THOUGH HE HAD NOT BEEN CONVICTED OF ANY CRIME.

A. Introduction.

In this matter, also one of first impression, Amici strongly support MacDougall's contention that, quite apart from the issue of inadequate transfer proceedings, his detention in a maximum-security state prison constitutes inappropriate punishment, in

violation of his right to due process under the state and federal constitutions (M.Br. 5-8). In support of his state constitutional claim, MacDougall properly relies upon this Court's decision in Brown v. Commissioner of Correction, 394 Mass. 89, 91-94 (1985), reaffirming the teaching of Jones v. Robbins, 8 Gray 329, 349 (1857), that, under art. 12 of the Massachusetts Declaration of Rights, "punishment in the state prison is an infamous punishment, and cannot be imposed without both indictment and trial by jury." See art. 12 ("the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury"). In support of his federal constitutional claim, MacDougall properly relies upon the U.S. Supreme Court's pronouncement in Bell v. Wolfish, 441 U.S. 520 (1979), that,

> [i]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause [of the Fourteenth Amendment], a [pretrial] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. See Ingraham v. Wright, 430 U.S. 651, 671-672 n.40, 674 (1977); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165-167, 186 (1963);

> Wong Wing v. United States, 163 U.S. 228, 237 (1896). A person lawfully committed to pre-trial detention has not been adjudged guilty of any crime. He has had only a "judicial determination of probable cause as a pre-requisite to [the] extended restraint of [his] liberty following arrest." Gerstein v. Pugh, [420 U.S. 103,] 114 [1975]; see Virginia v. Paul, 148 U.S. 107, 119 (1893).... Under such circumstances, the Government concededly may detain him to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.

Bell v. Wolfish, id. at 535-537 (1979) (footnotes omitted).

In the following sections, Amici discuss several aspects of this matter that they wish to call to this Court's attention.

B. The Souza-Baranowski Correctional Center is tantamount to "the state prison."

In Brown v. Commissioner of Correction, supra, 394 Mass. at 89, this Court opined that the maximum security prison at Walpole (Cedar Junction) is "the state prison," that incarceration there is by definition "infamous punishment," and that such incarceration would be a violation of art. 12 if it were not the result of indictment and conviction of the inmate. As noted in Argument I, above, Cedar Junction

carries the highest security designation in the state correctional system, Level 6. Only one other prison is a Level 6, the Souza-Baranowski Correctional Center, where MacDougall is presently being held. Therefore, for purposes of assessment of MacDougall's appellate claim in the present matter, Souza-Baranowski should be considered the equivalent of "the state prison."

C. MacDougall's treatment at Souza-Baranowski is indistinguishable from that experienced by the convicted inmates who are serving their sentences there.

MacDougall's detention at the Souza-Baranowski Correctional Center -- amidst the population of convicted felons who are serving their sentences there -- constitutes punishment. He is not being treated with any special solicitude by virtue of his pretrial status. See MacDougall's petition pursuant to G.L. c.211, §3, par. 13 (describing his "conditions of confinement as a pretrial detainee in the state prison [as] identical to those of a convicted felon, sentenced to the state prison as punishment") (R.A. 29).[7/] Whatever it is about the daily prison regimen at Souza-

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[7/]When MacDougall wrote those words, he was incarcerated at Cedar Junction (R.A. 32). There is nothing in the record to suggest that his characterization of his treatment at Souza-Baranowski would be any different.

Baranowski that constitutes "punishment" of the convicted inmates applies equally to MacDougall. In short, he is being punished, even though he has not been found guilty of any crime.

D. Amici note the equal protection implications of this matter.

Quite apart from the foregoing argument regarding due process principles, Amici point out an equal-protection problem with G.L. c.276, §52A, which, although not raised by MacDougall below, merits this Court's attention. As noted above, §52A authorizes transfer of a pretrial detainee to state prison only where the detainee "ha[s] been previously incarcerated in a correctional institution of the commonwealth under sentence for a felony...." Thus, the statute draws a significant distinction between two groups of pretrial detainees who are otherwise similarly-situated: those who previously served time in a state institution and those who did not. Amici discern no rational basis for drawing such a distinction, which imposes a very heavy burden on the liberty interests of some detainees, while sparing others.

The Fourteenth Amendment to the United States Constitution guarantees that "[n]o State shall make or

enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." See art. 1 of the Massachusetts Declaration of Rights. "State action violates equal protection rights if it subjects persons to classification resulting in different treatment," Commonwealth v. Arment, 412 Mass. 55, 63 (1992), without an adequate showing that the state has "a rational or conceivable basis" for the disparate treatment. Lee v. Commissioner of Revenue, 395 Mass. 527, 529-530 (1985). See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1973); Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 457-458 (1988).

Under the foregoing authority, the distinction in G.L. c.276, §52A, between similarly-situated pretrial detainees, based solely on the happenstance of whether they previously have served a felony sentence in a state institution, is truly irrational. Therefore, MacDougall's right to equal protection of the laws has been violated.

E. Conclusion.

In sum, Amici contend that the single justice erred in endorsing the Superior Court judge's denial of MacDougall's motion to be transferred back to the

Norfolk County jail. Therefore, the single justice's ruling should be reversed.

III.

ASIDE FROM AN ORDER BY THIS COURT THAT MACDOUGALL BE RETURNED FORTHWITH TO THE NORFOLK COUNTY JAIL, THERE DOES NOT EXIST ANY ADEQUATE ALTERNATIVE REMEDY FOR THE DEPRIVATION OF DUE PROCESS THAT MACDOUGALL HAS ENDURED.

In its order of July 29, 2005, granting MacDougall permission to proceed with his appeal from the single justice's ruling, this Court directed the parties to

> address in their briefs whether adequate alternative remedies exist, including but not necessarily limited to whether MacDougall is or should be entitled to a direct appeal to the Appeals Court from the denial of his interlocutory motion to transfer, or whether a separate civil action commenced in the Superior Court challenging the transfer would suffice.

(R.A. 60)

Amici support MacDougall's contention that there is no adequate alternative remedy available at this time (M.Br. 8-9). A direct appeal from the judge's ruling to the Appeals Court would be inappropriate for two reasons. First, it is Amici's experience that, generally speaking, the "life cycle" of an appeal is longer in the Appeals Court than in this Court. Therefore, a remand or transfer of the case to the Appeals Court would almost surely add a substantial

amount of time to the period of deprivation that MacDougall is experiencing. To MacDougall, every day spent at Souza-Baranowski Correctional Center constitutes additional "infamous punishment," as well as an increased potential for physical harm and disruption of planning for trial. As MacDougall put it in his brief, "[t]he pivotal point" here is "how long will justice be delayed" (M.Br. 8-9) (footnote omitted). Moreover, as this important matter is one of first impression in this jurisdiction, this Court, as the highest authority in the jurisdiction, should render a decision which definitively interprets G.L. c.276, §52A, and resolves the issues in this case.

Amici also agree with MacDougall's rejection of the notion of seeking redress through a civil action in the Superior Court. Such a course would very likely be even more time consuming than would a remand directly to the Appeals Court. Again, it cannot be emphasized too strongly that time is of the essence to MacDougall. Moreover, the Superior Court (Dortch-Okara, J.) has already had an opportunity to interpret G.L. c.276, §52A, and has rendered the flawed ruling which underlies the present appeal.

CONCLUSION

In light of the foregoing Arguments, Amici urge this Court (1) to rule that the single justice erred in denying MacDougall's petition pursuant to G.L. c.211, §3; (2) to order that MacDougall be returned forthwith to the Norfolk County jail; and (3) to order that no further transfer of MacDougall to any other correctional institution (county or state) occur unless by court order, preceded by an evidentiary hearing and findings of fact by a judge.

Respectfully submitted,

PETER M. ONEK
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JOHN REINSTEIN
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ACLU OF MASSACHUSETTS
211 Congress Street
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December, 2005.

ADDENDUM

United States Constitution

Fourteenth Amendment, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts Declaration of Rights

Article 1

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Article 12

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject

shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Article 13

In criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen.

Massachusetts General Laws

Chapter 127, Section 22 (2004 ed.)

Separation of prisoners; minors.

Section 22. Male and female prisoners shall not be put or kept in the same room in a jail or house of correction; nor, unless the crowded state of the institution so requires, shall any two prisoners, other than debtors, be allowed to occupy the same room, except for work. Persons committed for debt shall be kept separate from convicts and from persons who are confined upon a charge of an infamous crime. Conversation between prisoners in different apartments shall be prevented. Minors shall be kept separate from notorious offenders and from persons convicted of an infamous crime. Persons committed on charge of crime shall not be confined with convicts, and prisoners charged with or convicted of a crime not infamous shall not be confined with those charged with or convicted of an infamous crime, except

while at labor or assembled for moral or religious instruction, at which time no communication shall be allowed between prisoners of different classes.

Chapter 276, Section 52A (2004 ed.)

Removal of Persons Held in Jail for Trial to a Jail in Another County.

Section 52A. Persons held in jail for trial may, with the approval of the district attorney, and shall, by order of a justice of the superior court, be removed by the commissioner of correction to a jail in another county, and said commissioner shall, at the request of the district attorney, cause them to be returned to the jail whence they were removed. In addition, such persons, if they have been previously incarcerated in a correctional institution of the commonwealth under sentence for a felony, may, with the approval of the district attorney, be removed by the commissioner of correction to a correctional institution of the commonwealth, and said commissioner shall, at the request of the district attorney, cause them to be returned to the jail where they were awaiting trial. The proceedings for such removals shall be the same as for the removal of prisoners from one jail or house of correction to another. The cost of support of a person so removed and of the removals shall be paid by the county whence he is originally removed.

Massachusetts Department of Correction

Correctional Institution/Security Levels

103 DOC 101

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MASSACHUSETTS DEPARTMENT OF CORRECTION	DIVISION: OFFICE OF THE DEPUTY COMMISSIONER
TITLE: CORRECTIONAL INSTITUTIONS/SECURITY LEVEL	NUMBER: 103 DOC 101

Purpose: To establish a standard listing of each state correctional institution and its appropriate security level within the Department organization.

References: MGL Ch 124, section 1 (c) and (q)
ACA Standard

Applicability: Staff **Public Access:** Yes

Responsible Staff for Implementation and Monitoring of Policy:

Commissioner
Superintendent

Promulgation Date: 01/18/2005 **Effective Date:** 02/17/2005

Cancellation: This policy cancels all Departmental policies, procedures, commissioner's bulletins and rules and regulations regarding the organizational history as it pertains to correctional institution status and placement within the Department.

Severability Clause: If any part of this policy is, for any reason, held to be in excess of the authority of the Commissioner, such decision will not affect any other part of this policy.

101.01 General Policy

1. The commissioner shall meet with each superintendent of a correctional institution at least semi-annually in order to facilitate communication, establish policy and explore problems, ensure conformity to legal and fiscal requirements, and implement programs.

2. The deputy commissioner, associate commissioner of administration, associate commissioner of reentry and reintegration, and general counsel shall meet with all institution superintendents at least twice per year to ensure that programs are being implemented as outlined in administrative policy, to discuss current issues, and to allow superintendents the opportunity for direct input into policy development.

3. Assistant deputy commissioners shall meet with all superintendents at least once per month to discuss issues relating to the operation of institutions under his/her control.

101.02 Institutional Responsibility

The superintendent of each institution is appointed by the commissioner of correction. Superintendents shall have, at a minimum, the following qualifications: a bachelor's degree in an appropriate discipline and demonstrated administrative ability and leadership. The degree requirements may be satisfied by completing a career development program that includes work-related experience, training, or college credits at a level of achievement equivalent to the bachelor's degree.

The superintendent shall execute his/her powers and duties subject to the authority and control of the commissioner of correction, and pursuant to M.G.L. Chapter 125, Section 14. The superintendent shall also be ultimately responsible for the overall functioning of the institution, including the supervision of:

1. Inmates
2. Institution personnel
3. Volunteers
4. All programs and activities connected with the institution.
5. All institution fiscal and budget matters.

101.03 Security Levels

1. **Level 1**

This security level is the least restrictive in the department and is reserved for only those inmates who are at the end of their sentence and have been identified as posing little to no threat to the community. Supervision is minimal and indirect. Level 1 institutions are considered less secure institutions.

2. **Level 2**

A security level in which both design/construction as well as inmate classification, reflect the goal of restoring to the inmate the maximum of responsibility and control of their own behavior and actions prior to release. Direct supervision of these inmates is not required, but intermittent observation may be appropriate under certain conditions. Inmates within this security level may be permitted to access the community unescorted to participate in programming to include, but not be limited to, work release, educational release, etc. Level 2 institutions are considered less secure institutions.

3. **Level 3**

A security level in which both the design/construction as well as inmate classification, reflect the goal of returning to the inmate a greater sense of personal responsibility and autonomy while still providing for supervision and monitoring of behavior and activity. Inmates within this security level are not considered a serious risk to the safety of staff, inmates or the public. Program participation is mandated and geared toward their potential reintegration into the community. Access to the community is limited and under constant direct staff supervision. Level 3 institutions are considered less secure institutions.

4. **Level 4**

A security level in which both the design/construction as well as inmate classification, reflect the goal of restoring to the inmate some degree of responsibility and control of their own behavior and actions, while still

insuring the safety of staff and inmates. Design/construction is generally characterized by high security perimeters and limited use of internal physical barriers. Inmates within this security level have demonstrated the ability to abide by rules and regulations and require intermittent supervision. However, behavior in the community, i.e., criminal sentence and/or the presence of serious outstanding legal matters, indicate the need for some control and for segregation from the community. Job and program opportunities exist for all inmates within the perimeter of the facility. Level 4 institutions are considered secure institutions.

5. **Level 5**

A security level in which design/construction as well as inmate classification, reflect the need to provide maximum external and internal control and supervision of inmates. Inmates within this security level may present an escape risk or pose a threat to inmates, staff, or the orderly running of the institution, however, at a lesser degree than those at level 6. Supervision remains constant and direct. Through an inmates' willingness to comply with institutional rules and regulations, increased job and program opportunities exist. Level 5 institutions are considered secure institutions.

6. **Level 6**

A security level in which both design/construction as well as inmate classification, reflect the need to provide maximum external and internal control and supervision of inmates primarily through the use of high security perimeters and extensive use of internal physical barriers and check points. Inmates within this security level present serious escape risks or pose serious threats to themselves, to other inmates, to staff, or the orderly running of the institution. Supervision of inmates is direct and constant.

101.04 Massachusetts Correctional Institutions/Security Designations

1. Bay State Correctional Center ..... Level 4
2. Boston Pre-Release Center ..... Level 3/2
3. Bridgewater State Hospital ..... Level 4

4. MCI Cedar Junction ..... Level 6
5. MCI Concord ..... Level 4
6. Contract Houses ..... Level 1
7. MCI Framingham ..... Level 4
8. Shattuck Hospital Correctional Unit ..... Level 4
9. Massachusetts Treatment Center ..... Level 4
10. Massachusetts Alcohol and Substance Abuse Center ..... Level 4
11. MCI Norfolk ..... Level 4
12. North Central Correctional Institution ..... Level 4
    NCCI Minimum Unit ..... Level 3
13. Old Colony Correctional Center ..... Level 5
    OCCC Minimum Unit ..... Level 3
14. Northeastern Correctional Center ..... Level 3/2
15. MCI Plymouth ..... Level 3
16. Pondville Correctional Center ..... Level 3/2
17. MCI Shirley ..... Level 4
    MCI Shirley Minimum Units ..... Level 3
18. South Middlesex Correctional Center ..... Level 3/2
19. Souza-Baranowski Correctional Center ..... Level 6

CERTIFICATE OF COMPLIANCE

I the undersigned, counsel for the Committee for Public Counsel Services as Amicus Curiae, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs.

PETER M. ONEK
BBO #552993
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Public Defender Division
44 Bromfield Street
Boston, Massachusetts 02108
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RECORD APPENDIX

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SJC-09509

MARK MacDOUGALL vs. COMMONWEALTH

ENTRY DATE	06/02/05	CASE STATUS	Rule 2:21 Mem&Appx filed
STATUS DATE	06/13/05	NATURE	Superintendence, c211, s3
ROUTE TO SJC	DESJA	ROUTE DATE	05/24/05
AC/SJ DKT NO	SJ-2005-0181	DAR/FAR NO	
APPELLANT	D	FAR APPLICANT	CV/CR CR
BRIEF STATUS	ared	BRIEF DUE	02/17/06 CLERK DL
ARGUED DATE		QUORUM	
DECISION DATE		CITATION	Mass. RSCRPT
LEAD CASE		RELATION	
TRIAL JUDGE	Ireland R.L.	TRIAL CT	SJC for Suffolk County
TC ENTRY DATE	05/04/05	TC DOCKET NO	SJ-2005-0181 PUBLIC y

Additional Information

Add'l trial court info: 04-0056, Dortch-Okara, Norfolk Superior.

Commonwealth
Plaintiff/Appellee
Awaiting red brief
next br. due 02/17/06
1 Extensions, 190 Days
Active 05/04/05

Mark MacDougall
Pro Se Defendant/Appellant
Box 8000
Shirley MA 01464
Mem. & Appx. under Rule 2:21
Active 05/04/05 Notify

S.J.C. for Suffolk County
(Lower Court: civil or general)
John Adams Courthouse, Room 1300
Pemberton Square
Boston MA 02108-1707
Phone: 617-557-1100 FAX: 617-523-1540
Active 05/04/05

Brian A. Wilson, A.D.A.
Office of the District Attorney/Norfol
45 Shawmut Road, 2nd Floor
Canton MA 02021
Phone: 781-830-4800 344
Fax: 781-830-4801
634043 Active 05/04/05 Notify

Peter M. Onek, Esquire
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44 Bromfield Street, Suite 310-A
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Phone: 617-988-8391
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552993 Withdrawn 10/28/05

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SJC-09509

MARK MacDOUGALL vs. COMMONWEALTH

CPCS
Amicus
44 Bromfield Street
Boston MA 02108
Awaiting green brief
Active 10/28/05

Peter M. Onek, Esquire
See above. (Notify)
Active 11/14/05

* * * D O C K E T * * *

APER	DATE	ENTRY
1.0	06/02/05	Entered. Notice to counsel.
2.0	06/02/05	MOTION to Waive Filing Fee, filed for Mark MacDougall, Pro se. *ALLOWED as to fee waiver only.
3.0	06/02/05	MOTION to file a Non-Conforming Memorandum of Law, filed for Mark MacDougall, Pro se. *ALLOWED. Ten copies may be filed.
4.0	06/13/05	SERVICE of Mem. & Appx. under Rule 2:21 for Defendant/Appellant Mark MacDougall, Pro se.
5.0	07/29/05	ORDER (By the Court): Mark MacDougall appeals from a judgment of a single justice of this court denying his petition pursuant to GLc211, s3. In 2002, he was indicted for certain felonies and held in the Norfolk County correctional facility in lieu of bail. While he was there, he allegedly assaulted a correctional officer. He was indicted for that offense and related offenses and ordered held without bail. He was subsequently transferred to the Plymouth County correctional facility and ultimately to the State prison at Cedar Junction, all while the various charges against him were pending. A superior Court judge denied his motion to transfer him to a jail or correctional institution while awaiting trial. This petition and appeal followed. MacDougal has filed a memorandum and appendix pursuant to SJC Rule 2:21, as amended, 434 Nass, 1301 (2001). Under this rule, MacDougall "must set forth the reasons why review of the trial court decision cannot adequately be obtained on appeal from any final adverse judgment in the trial court or by other available means." SJC Rule 2:21 (2). MacDougall argues that both transfers (to the Plymouth County correctional facility and to the State prison) violated GLc276, s52A; that the transfer to the State prison violated his Federal and State constitutional rights by subjecting him to punishment when he has not been convicted of any crime; and that he has no adequate remedy for these violations in the ordinary appellate process or otherwise. Without expressing an opinion on the merits of his statutory and constitutional claims, we are satisfied for purposes of Rule 2:21 that MacDougall should be permitted to proceed with his appeal in the ordinary course. If he is convicted, the conditions of his pretrial confinement will become moot, and any violation of his

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SJC-09509

MARK MacDOUGALL vs. COMMONWEALTH

* * * D O C K E T * * *

APER	DATE	ENTRY
		rights in this regard cannot be remedied on appeal. Moreover, we are aware of no other established means to obtain appellate review of this particular type of order. In addition to their arguments on the merits, the parties shall address in their briefs whether adequate alternative remedies exist, including but not necessarily limited to whether MacDougall is or should be entitled to a direct appeal to the Appeals Court from the denial of his interlocutory motion to transfer, or whether a separate civil action commenced in the Superior Court challenging the transfer would suffice. (Notice sent.)
6.0	08/03/05	NOTICE of address change, filed by Mark MacDougall, Pro Se..
7.0	08/03/05	MOTION for appointment of counsel, filed by Mark MacDougall, Pro Se.
8.0	08/16/05	MOTION to reconsider and strike the Court order of 7/29/05, filed for by Mark MacDougall, Pro Se.
9.0	10/14/05	NOTICE of Appearance filed by Peter M. Onek, Esquire. *NOTED.
10.0	10/17/05	MOTION to Withdraw Any and All of His Motions Pending on the Docket, filed for Mark MacDougall, Pro se.
11.0	10/17/05	SERVICE of appellant's brief w/appendix for Mark MacDougall, Pro se.
12.0	10/17/05	Petitioner's Second Notice of Address Change filed by Mark MacDougall.
13.0	10/19/05	Letter from Mark MacDougall regarding filing brief. *No action at this time.
14.0	10/27/05	Withdrawal of appearance of Peter M. Onek, Esquire for Mark MacDougall. *ALLOWED.
15.0	10/27/05	Letter from Atty. Onek regarding the withdrawal of appearance and plan to file amicus brief on behalf of Committee for Public Counsel Services in support of Mr. MacDougall's position. *Noted. Mr. Onek's appearance is withdrawn. Mr. MacDougall appears pro se.
16.0	10/31/05	Letter from Mark MacDougall: Appellant is proceeding pro se.
17.0	11/16/05	MOTION to extend to February 17, 2006, filing of brief of Commonwealth by Brian A. Wilson, A.D.A..

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

SJC-09509

MARK MacDOUGALL vs. COMMONWEALTH

* * * D O C K E T * * *

PAPER	DATE	ENTRY
	11/18/05	ALLOWANCE of Paper #17 to 02/17/2006 for filing of brief of Plaintiff/Appellee Commonwealth. Notice to counsel.
18.0	12/02/05	Motion for reconsideration and in opposition to Commonwealth's motion for enlargement of time or in the alternative, reduce the enlargement by 30 days, filed for Mark MacDougall by Mark MacDougall, Pro Se.

Mark MacDougall
Mass. State Prison
Post Office Box 100
So. Walpole, MA. 02071

May 16, 2005

Hon. Chief Justice Margaret Marshall,
Mass. Supreme Judicial Court
One Beacon Street / 4th Floor
Boston, Massachusetts 02108

Re: MacDougall v. Commonwealth,
S.J. No. ~~2005-0181~~

Dear Chief Justice Marshall:

On April 27, 2005, I posted for filing my pro se Petition For Extraordinary Relief pursuant to G.L. ch. 211 § 3. My petition challenges my pretrial detention in the State Prison under Article twelve of the Massachusetts Declaration of Rights with a parallel Federal Claim. And also the Commonwealth's failure to comply with procedural mandates of G.L. ch. 276 § 52A requiring an order from

Hon. Margaret Marshall, C.J.
May 16, 2005
Page two

a justice of the Superior Court.

To date, I have recieved no acknowledgement from Ms. Doyle's office regarding my filing(s). Not only are my substantive rights being violated, but just being in Walpole puts my life in jeopardy simply by the class of convicts held in this institution. All I want is my day in Court your Honor, as I have no other remedies, that day is in your Honorable Court. Therefore, could you please ask Ms. Doyle to process this matter without further delay.

Thank you for your anticipated time, attention and cooperation in this endeavor for justice.

Very truly yours,
Mark MacDougall
Mark MacDougall